United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1113

BPNS

To Be Argued By:
JOEL WINOGRAD and
RONALD GENE WOHL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ARIE D. LEVY,
NURIEL NURIELI,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

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JOINT BRIEF FOR APPELLANTS AND APPENDIX

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- -x

JOINT BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from judgments of convictions pursuant to Title 21, United States Code, Sections 846 and 841(a)(1), for conspiracy to possess, with intent to distribute, a quantity of cocaine and possession of cocaine, entered by United States District Judge John R. Bartels, after a jury trial.

Defendant-appellant Levy was sentenced to concurrent terms of 4 years incarceration, and defendant-

appellant Nurieli was sentenced to concurrent terms of 5 years incarceration.

FACTS

On or about September 21, 1974, Sharon Sharabi went to Kennedy Airport to pick up a coffee table consigned to her in her maiden name, Sharon Barr, from Cali Colombia (R110-118). Hidden in a hollowed-out support member, under the table was a quantity of cocaine (R-119; 292). When the table was examined by the Customs Inspector at Kennedy Airport, he found the cocaine, arrested Mrs. Sharabi and turned the matter over to Agent Castillo of the DEA. Agent Castillo made arrangements with Mrs.Sharabi to deliver the table to her apartment, leave Mrs. Sharabi's infant daughter with Mrs. Sharabi's mother, and set up a "stake-out" at the Sharabi apartment. Later in the evening of that day, the defendants-appellants arrived at the Sharabi residence to set up the table, which had been received in a disassembled condition (R-127; 290).

Sharon Sharabi testified that a paper shopping bag was in possession of the defendant Nurieli when defendants arrived at her apartment. Defendant Levy testified

that the bag had been left locked in Levy's car. Mrs. Sharabi testified at the trial that the defendants went over to the table but that she remembered nothing after seeing them go to the table (R-133). The Court permitted the United States Attorney to attempt to refresh Mrs. Sharabi's recollection respecting statements she had made to the Grand Jury, wherein she had stated that she saw the defendant Levy remove the cocaine from the table, throw it to the defendant Nurieli, who then threw it in the shopping bag (R-138-149; 180-186). When Mrs. Sharabi's recollection could not be refreshed, the Court permitted the United States Attorney, over the strenuous objection of counsel, to read from the Grand Jury Minutes, asking Mrs. Sharabi whether she had been asked various questions and given various answers. While Mrs. Sharabi admitted being asked the questions and having given the answers, she did not change her testimony that she could not recall any of the events set forth in the inconsistent portion of the Grand Jury Minutes. The Court then permitted the United States Attorney to read from consistent portions of the Grand Jury Minutes, also over the strenuous objection of counsel, until partway through this reading, the Court

reversed itself and stopped the United States Attorney from reading any further (R-222-228). Prior to Mrs. Sharabi's testimony before the Grand Jury on October 1, 1974, on September 21, 1974, the day of her arrest, Mrs. Sharabi had given a four-page handwritten statement to Agent Castillo, which statement was itself inconsistent with the Grand Jury testimony (R-200-202). In the statement she said that she saw defendant Nurieli take the cocaine from the table and put it in a shopping bag. There were no witnesses (other than Sharon Sharabi) to the removal of the cocaine from the table or to the physical possession of the cocaine by either of the defendants.

The agents, who were hiding in Mrs.Sharabi's bedroom, arrested the defendants and they then took defendant Levy's keys from his pocket, searched his automobile without warrant, and removed several items therefrom (R-49-50). The Government agreed to suppress all items removed from the vehicle with the exception of the shopping bag, which the Government contended had been brought into the Sharabi residence by the defendant Nurieli (R-51).

Sometime prior to trial, on January 7, 1975, on oral notice, the Government moved to unseal the defendants' State of Israel passports, which passports had

been turned over to the Court at the time the defendants were admitted to bail. The hearing on the motion was held on January 7th, in the absence of counsel for the defendant Levy, who was engaged in another court. The passports indicated that the defendants were in Colombia at the time that the table had been shipped from that country.

During questioning of DEA Agent Castillo by the United States Attorney, he stated that Sharon Sharabi was concerned about reprisals (from the defendants) at the time of their release from jail. After a motion for a mis-trial, the Court determined that the United States Attorney had been aware the Agent was going to answer in the manner he did at the time the statement was made (R-313-319).

At the hearing on the motion to suppress, prior to trial, defendant Levy called Sharon Sharabi as a witness but his counsel was denied by the Court the opportunity to speak to her prior to her testimony, while in no way limiting the United States Attorney's access to the witness (R-33-34).

QUESTIONS PRESENTED

1. Should the jury have been permitted to consider Sharon Sharabi's Grand Jury testimony as affirmative evidence when she testified at the trial that she could not recall the events surrounding the removal of the cocaine from the table, especially in view of the fact that Sharon Sharabi's signed statement contemporaneous with the event was at variance with the Grand Jury testimony?

2. Should the jury have been permitted to hear consistent Grand Jury testimony?

3. Should the Court have unsealed the Israeli passports of the defendants-appellants and turned them over to the Government, in violation of their Fifth Amendment rights?

4. Even if the Court's actions did not,in and of themselves, constitute reversible error, was not the cumulative effect of the Court's actions such error as required reversal?

POINT I

THE COURT ERRED IN PERMITTING THE JURY TO CONSIDER SHARON SHARABI'S GRAND JURY TESTIMONY AS AFFIRMATIVE EVIDENCE AT A TIME DURING THE TRIAL WHEN SHE COULD NOT RECALL CERTAIN EVENTS AND THE GOVERNMENT COULD NOT REFRESH HER RECOLLECTION OF THE EVENTS, THE GRAND JURY TESTIMONY BEING AT VARIANCE WITH THE PRIOR SIGNED STATEMENT GIVEN TO THE GOVERNMENT. THE ERROR WAS COMPOUNDED BY THE INTRODUCTION OF CONSISTENT GRAND JURY TESTIMONY.

It is the general rule that Grand Jury testimony may not be used as affirmative evidence. United States v. Allsup, 1973, 8 Cir., 485 F.2d. 287.

The Second Circuit has, since the case of United States v. DeSisto, 1964, 2 Cir., 328 F.2d. 929, followed the minority view, which minority view is now about to become the law of the land on July 1st, 1975 as Rule 801(d)(1)(A) [Public Law 93-595, 88 Stat. 1938]. The rationale behind the DeSisto rule and the new rule of evidence, which rules were not in effect at the time of this trial, is that there is a guarantee of trustworthiness such as will insulate against the dangers of hearsay testimony because of the witness being placed under oath at the time of the making of the first statement. Judge Friendly, speaking of the

witness who had testified at a prior trial and been subjected to cross examination at the prior trial, called the ritual existing prior to DeSisto, where a jury could consider the prior statement only for the purposes of credibility but not as affirmative evidence, absurd. He later went on to discuss the fact that the prior rule defied the common sense rule that memory is fresher and more accurate closer to the event. He then went on to point out that both the Supreme Court, in Bridges v. Wixon, 1945, 326 U.S. 135, 154-154, and Professor Wigmore felt that there was a great safeguard in the fact that a prior statement would have the additional guarantee of trustworthiness, in that the person making the statement was subject to prosecution for perjury at the time of the making of the statement.

The case at bar is inapposite to DeSisto for several reasons. First, the witness had no recollection of the events at the time of the trial. It was not a situation where the witness recalled the events differently than she had recalled them in the Grand Jury. Second, her testimony in the Grand Jury, while presumptively, under the guidelines set forth by Judge Friendly in DeSisto, clothed in a

guarantee of trustworthiness, was at variance in very material detail to a prior signed statement given to the Government on the very day the events took place, several days prior to the Grand Jury testimony. Virtually all of the arguments Judge Friendly made in DeSisto to support the use of the Grand Jury statement as affirmative evidence in that case, can be used against the use of the Grand Jury testimony in the case at bar and in support of the introduction of the inconsistent prior signed statement. While the Grand Jury statement may be presumptively trustworthy, that presumption has certainly been rebutted by the existence of the inconsistent signed statement made contemporaneous with the event covered by the testimony. Even assuming, arguendo, that it was proper to leave the question of the truth or falsity of the Grand Jury testimony for the jury, having been exposed to the witness during the trial and having had the opportunity to see the witness subjected to cross examination during the trial, it would certainly seem important that the jury should also be instructed to consider the prior inconsistent signed statement.

During its charge in the case at bar, the Court pointed out that the testimony at the trial contradicted the Grand Jury testimony (R-704); that Mrs. Sharabi perjured herself either at the trial or in the Grand Jury (R-705); and that the jury could believe her testimony in the Grand Jury or at the trial (R-705); and accept the Grand Jury testimony and disregard the trial testimony or vice versa (R-706). The Court refused to instruct the jury respecting the prior signed statement, although requested by counsel (R-715; 720). The Court refused to charge that the jury could reject both the trial and Grand Jury testimony of Sharon Sharabi (R-723). However, the Court did, in a supplementary charge, retract its statement as to Mrs. Sharabi's perjury, watering it down and at the same time further emphasizing to the jury that either the Grand Jury testimony or the trial statement could be accepted, by saying "I think its more accurate to say she was not telling the truth at one of these times * * * " (R-724).

In addition to permitting the introduction of Grand Jury testimony into evidence for the consideration as affirmative evidence in the trial by the jury, which determination has been objected to, the Court went further into an area not contemplated by either the New Federal Rules of Evidence or the DeSisto case, by permitting the

Government to examine Mrs. Sharabi on prior consistent Grand Jury testimony (R-222-228), at which point the Court reversed itself and accepted the defense contention as to the impropriety of the United States Attorney reading the consistent Grand Jury testimony into evidence.

The Government had started on its journey through the Grand Jury Minutes in an effort to impeach their own witness, later offering the Grand Jury Minutes as affirmative evidence to be considered by the jury for its substantive content. There was a strange double-standard present during the trial. The Government was not bound by their witness' testimony, although the defense apparently was. At the hearing prior to the trial, when Levy's counsel called Mrs. Sharabi, the Court ruled, "You'll be bound by what she says". It is respectfully urged that whichever standard the Court accepts, should be, at the very least, equally applied as between the Government and the defense, this especially in view of the fact that Mrs. Sharabi was the Government's witness, under the Government's control and subject to Government preparation prior to her testimony. The Court refused to permit Sharon Sharabi to be called without a recess during the hearing. The Court later refused to require the Govern-

ment not to speak with the witness before the defendant Levy's counsel called her to the stand, and the Court further refused, while allowing the United States Attorney to speak to Sharon Sharabi, to permit either defendant Levy's or Nurieli's counsel to speak to Mrs. Sharabi. It is respectfully urged that there was no reason not to allow defense counsel to speak with Mrs. Sharabi before calling her to the witness stand, especially in view of the United States Attorney not being so admonished. However this violation of the defendants' rights pales when viewed in the context of the self-same witness later being impeached by the United States Attorney at a time when she could not recall certain matters. This double-standard of impeachment, when further viewed in the light of the use of the impeaching evidence as affirmative evidence of the guilt of the defendants, is even more outrageous; and then as the "coup de grace" the Court's charge wherein only the trial testimony and the impeaching testimony were to be considered by the jury, without any reference whatsoever in the Court's charge to the prior inconsistent signed statement, or even the fact that the jury could reject both the trial testimony and the impeaching Grand Jury testimony.

In view of the fact that the testimony in question refers to the physical handling of the smuggled narcotics by the defendants, it is especially crucial for the jury's determination that they be properly instructed respecting same and that nothing less than the most credible evidence be presented to the jury for their consideration. The guarantees of trustworthiness relied upon in DeSisto and the New Federal Rules, are non-existent in the case at bar, and all evidence,other than the evidence elicited at the trial from the mouth of the witness and subject to cross examination,should have been excluded, or in the alternative, and assuming, arguendo, that the Grand Jury testimony was admissible, that the Court properly instruct the jury that both the Grand Jury evidence and the trial evidence could be rejected and further that the jury could accept the prior sworn statement in lieu thereof.

POINT II

THE COURT ERRED IN UNSEALING AND ADMITTING INTO EVIDENCE DEFENDANTS' STATE OF ISRAEL PASSPORTS

Defendants turned their Israeli passports over to the Clerk of the Court as a prerequisite to being admitted to bail, and at that time, it was requested by counsel for the defendants that the passports be sealed and not turned over to the Government.

Subsequently, in early January, 1975, the Government made an oral application to the Court to unseal the passports, which application was heard on January 7, 1975, in the absence of counsel for defendant Levy, who was actually engaged in another court and arrived at court just subsequent to the argument and ruling by Judge Bartels.

The Government relied on the case of United States v. Falley, 1973, 2 Cir., 489 F.2d. 33, 41. This Court, in discussing the Fifth Amendment privilege respecting a United States passport, determined that the Fifth Amendment privilege against self-incrimination did not apply to such a passport, stating that the Fifth Amendment

"* * * guaranty does not apply without this tripartite unity of ownership, possession and self-incrimination". In Falley, the claim failed because the element of ownership was not present, the passport being a United States passport, and under applicable Federal regulation, the property of the Government. In the case at bar, there was no proof whatsoever, short of the wording on the passports themselves, as to the ownership of the passports. No evidence was presented as to Israeli law, nor was any witness presented from the Israeli government to testify as to the ownership of the passports. Respecting the Falley case, however, it is clear that the passports were the property of the United States Government. Moreover, even if the passports were the property of the government of the State of Israel, as between the United States and the defendants, the defendants certainly had a greater right to possession, if not ownership, of the passports. Accordingly, the case at bar is distinguishable from the Falley case, in that not only are the passports in question not the property of the United States Government, but there has been no proof to show that they are not the property of the defendants, in whose possession they were prior to them being turned over to the Clerk of the Court for the express purpose of satisfying bail requirements.

The passports were highly prejudicial, in that they presented the only way that the Government could prove that the defendants were in Colombia at the time the coffee table was consigned from that country, the only other evidence to that effect having been voluntarily suppressed by the Government because of an illegal search. While the evidence of the defendants' presence in Colombia was not conclusive respecting their guilt, it was so highly suggestive as to be extremely prejudicial.

It is respectfully urged that it was the Government's burden to prove that the passports did not belong to the defendants, and the mere introduction of a portion of the passports themselves hardly satisfied that burden.

It is respectfully urged that the passports should not have been unsealed and should come within the Fifth Amendment protection, in view of the defendants' possession, their obvious self-incrimination, and as between the United States and the defendants, and absent any testimony to the contrary, their ownership as well.

POINT III

EVEN IF THE VARIOUS ERRORS COMMITTED WERE, IN AND OF THEMSELVES, INSUFFICIENT IN LAW TO REQUIRE REVERSAL, THE CUMULATIVE EFFECT OF THE ERRORS CONSTITUTE REVERSIBLE ERROR

In the direct examination of the case agent by the United States Attorney, discussing the Government's witness Sharon Sharabi, the prosecutor elicited hearsay testimony to the effect that Mrs. Sharabi "* * * was concerned about reprisals due to her cooperation with the Federal agents, and there came a time when she found out that the defendants Levy and Nurieli had been released from jail --" (R-313). Counsel immediately objected and moved for the declaration of a mis-trial. The Court excused the jury, ascertained from the prosecutor that she knew that prejudicial testimony was going to be elicited, and the Court then advised the prosecutor "We can't prejudice this Jury with statements of that kind" (R-315). The Court denied the motions for a mis-trial and attempted to resolve the prejudicial statement by a limiting instruction (R-318-319), which limiting instruction, it is respectfully submitted, did not accomplish the desired purpose.

While the brief reference to Sharon Sharabi's alleged fear of reprisal, and the brief reference to jail, may not, in and of themselves, constitute reversible error, it is respectfully urged that when taken in conjunction with the points previously made, including, but not limited to, the introduction of Grand Jury testimony as affirmative evidence, the introduction of consistent Grand Jury testimony, the double-standard respecting impeachment of a party's own witness, and the unsealing of the Israel passports of the defendants and their use in violation of their Fifth Amendment rights, taken in the aggregate constitute cumulative error such as ought to require a reversal. United States v. Guglielmini, 1967, 2 Cir., 384 F.2d. 602.

CONCLUSION

IN VIEW OF THE FOREGOING, IT IS RESPECTFULLY URGED THAT THE JUDGMENTS OF CONVICTION BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

JOEL WINOGRAD,
Attorney for Defendant-Appellant,
Nuriel Nurieli

RONALD GENE WOHL,
Attorney for Defendant-Appellant,
Arie D. Levy

BRAND, J.

74CR 603

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

ARIE D. LEVY
NURIEL NURIELI and
ARIE SHARABI,

Defendants.

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INDICTMENT

Cr. No. 74 CR 603
(T.21 U.S.C., §846, §841(a)(1) and §952(a); T. 18 U.S.C., §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 21st day of May 1974, and the 21st day of September 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants ARIE D. LEVY, NURIEL NURIELI and ARIE SHARABI did knowingly and intentionally conspire to commit an offense against the United States in violation of Title 21 United States Code, Section 841(a)(1), to wit: the defendants ARIE D. LEVY, NURIEL NURIELI and ARIE SHARABI knowingly and intentionally did conspire to possess, with intent to distributo, a quantity of cocaine, a Schedule II narcotic drug controlled substance.

In furtherance of the conspiracy, and to accomplish the objectives thereof, the defendants committed the following

OVERT ACTS

1. On or about the 22nd day of May, 1974, the defendant Arie D. Levy drove the defendant Arie Sharabi and his wife, Sharon Sharabi, to John F. Kennedy International Airport, Queens, New York.

2. On or about the 20th day of September, 1974, the defendant Arie D. Levy and the defendant Nuriel Nurieli met with Sharon Sharabi at the apartment of the defendant Arie Sharabi 1472 43rd Street, Brooklyn, New York.

3. On or about the 21st day of September, 1974, the defendant Arie D. Levy and the defendant Nuriel Nurieli together removed a quantity of cocaine from a concealed location in a table which was located in the apartment of the defendant Arie Sharabi at 1472 43rd Street, Brooklyn, New York. (Title 21, United States Code, Section 846.)

COUNT TWO

On or about the 21st day of September, 1974, within the Eastern District of New York, the defendants ARIE D. LEVY and NURIEL NURIELI knowingly and intentionally possessed, with intent to distribute approximately 6 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1).)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Shirley Lavender, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York.

That on the 3rd day of June, 1975, deponent served the within JOINT BRIEF FOR APPELLANTS AND APPENDIX, upon the attorney for Appellee, HON. DAVID G. TRAEGER, United States Attorney for the Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Shirley Lavender

Sworn to before me this
3rd day of June, 1975.

Ronald Wohl

RONALD WOHL
Notary Public State of New York
No 30-9718820
Qualified in Nassau County
Commission Expires March 30, 1976